

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F409551

MARCOS AMAYA, Employee	CLAIMANT
NEWBERRY'S 3N MILL, Employer	RESPONDENT
AIG CLAIMS SERVICE, Carrier	RESPONDENT

OPINION FILED AUGUST 28, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MELISSA ROSS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 26, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 31, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The prior opinions are final and res judicata.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional temporary total disability.
2. Medical; specifically, surgery by Dr. Danks.
3. Attorney fee.

The claimant contends he is entitled to additional temporary total disability and medical for his compensable injury of June 2, 2004.

The respondents contend that all appropriate benefits have been paid with regard to this claim. Dr. Cathey has performed an IME on the claimant and has indicated that claimant has reached maximum medical improvement with a full release and no restrictions in his activities. Further, claimant has undergone a functional capacity evaluation as of March 21, 2006 and unreliable effort was found. Medical records do not support entitlement to additional indemnity benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 31, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, surgery by Dr. Danks.
3. Claimant is entitled to temporary partial disability benefits from January 5, 2006, the date of the last hearing, through March 21, 2006, the date of claimant's functional capacities evaluation.
4. Respondent has controverted claimant's entitlement to any unpaid indemnity benefits between January 5, 2006 and March 21, 2006.

FACTUAL BACKGROUND

This claim has been the subject of two prior hearings. The initial hearing was conducted on April 7, 2005 and an opinion was issued following that hearing finding, *inter*

alia, that claimant had suffered a compensable injury to his back while working for respondent on June 2, 2004. That opinion also awarded claimant reasonable and necessary medical treatment for his compensable back injury.

A second hearing was conducted on January 5, 2006 on the issue of claimant's entitlement to temporary total disability benefits. In an opinion filed January 30, 2006, I found that claimant was entitled to temporary partial disability benefits at the rate of \$109.00 per week beginning June 3, 2004, and continuing through a date yet to be determined. Claimant was found to only be entitled to temporary partial disability benefits because he was performing some work for wages.

Claimant's primary treating physician for his compensable back injury has been Dr. Danks. The medical records indicate that claimant and Dr. Danks have discussed the possibility of claimant undergoing surgery for his back condition. Claimant has filed this claim contending that he is entitled to additional medical treatment; specifically, surgery from Dr. Danks. He also seeks payment of additional temporary total disability benefits.

ADJUDICATION

The initial issue for consideration involves claimant's request for additional medical treatment; specifically, surgery from Dr. Danks. Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, ____ S.W. 3d ____ (2004).

____ After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that surgery is reasonable and necessary.

The medical records indicate that claimant has primarily been treated conservatively by his treating physicians, including Dr. Danks, neurosurgeon. Dr. Danks recommended that claimant undergo epidural steroid injections for his back injury. In a report dated

March 14, 2006, Dr. Danks noted that the epidural steroid injections provided only temporary relief. Dr. Danks' report of that date indicates that he discussed various options, including surgery, with the claimant. However, Dr. Danks also stated: "At this time, he does not feel like he would like to proceed with surgical treatment." As a result, Dr. Danks ordered a functional capacities evaluation.

The functional capacities evaluation was performed on March 21, 2006. The evaluation report indicates that claimant gave an "unreliable effort" during the evaluation. The evaluation report states in pertinent part:

Mr. Amaya demonstrated higher than expected coefficient of variations with repetitive trial isometric strength testing, which is an indication of inconsistent effort between repeated trials. Mr. Amaya also had inappropriate results with horizontal strength change testing, which is also an indication of inconsistent effort with isometric strength testing.

Mr. Amaya's AROM with lumbar flexion was significantly limited during form evaluation but with functional aspects of the testing, Mr. Amaya was noted to have minimal deficits with lumbar flexion. Mr. Amaya demonstrates normal movement patterns throughout testing yet demonstrated moaning with slow movement patterns with formal measurement.

Mr. Amaya's pain reports did not correlate with his movement patterns and overall abilities. He moved freely throughout testing and with significant body mechanic changes that indicated pain. He demonstrates no outward expression of pain and no facial expressions indicating pain as well. These do not correlate with his subjective complaints of pain at a level 7. His movement patterns did not change when his pain went between a 4 and 7.

It is further noted that Mr. Amaya was positive on Waddell's signs for non-organic back pain including passive hip rotation, over reaction to light touch, regional pain over a broad area and axial loading of the spine. These are inappropriate illness responses.

The functional capacities evaluation report went on to state that even though the

claimant demonstrated inconsistent effort, he nevertheless had the ability to perform medium-level work. The functional capacities evaluation results are in direct contrast to claimant's testimony at the hearing that he is only able to work an average of two days per week before having to rest for several days.

After the functional capacities evaluation, Dr. Danks authored a letter dated May 3, 2006. Dr. Danks notes that he had not evaluated the claimant since the last visit on March 14, 2006, and that he had not seen the results of the functional capacities evaluation. Dr. Danks reiterated his prior discussion of surgery and claimant's statement that claimant did not wish to proceed with surgery. Dr. Danks indicated that claimant's work limitations would be dictated by the functional capacities evaluation and noted that in his opinion the claimant had reached maximum medical improvement.

As previously noted, claimant has the burden of proving by a preponderance of the evidence that the requested medical treatment of surgery is reasonable and necessary. In this particular case, claimant has previously indicated to Dr. Danks that he did not wish to proceed with surgical treatment. Although claimant testified at the hearing that he now does wish to proceed with surgery, there is no indication that Dr. Danks is still of the opinion that surgery is necessary, particularly when one considers the functional capacities evaluation which shows that claimant gave an unreliable effort and demonstrated inappropriate illness responses. In addition, Dr. Danks in his letter of May 3, 2006 indicated that claimant had reached maximum medical improvement.

Given all of this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, surgery from Dr. Danks.

The next issue for consideration involves claimant's request for additional temporary total disability benefits. As previously noted, a prior hearing was conducted on January 5, 2006, and an opinion was filed on January 30, 2006 awarding claimant temporary partial

disability benefits beginning June 3, 2004 and continuing through a date yet to be determined. The prior award of temporary partial disability benefits was based upon the fact that claimant was performing some work for another employer after his compensable injury. Therefore, claimant did not suffer a total incapacity to earn wages. At the most recent hearing conducted on July 26, 2006, claimant testified that he was doing the same work which he had previously performed at the time of the hearing on January 5, 2006.

In order to be entitled to temporary partial disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffered a partial incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, claimant's healing period had ended at least by May 3, 2006 when Dr. Danks opined that claimant had reached maximum medical improvement. However, claimant must also prove by a preponderance of the evidence that he suffered a partial incapacity to earn wages. I find based upon the evidence presented that claimant no longer suffered a partial incapacity to earn wages as of March 21, 2006, the date of his functional capacities evaluation. As previously noted, claimant gave an unreliable effort during that evaluation and even with the unreliable effort the evaluation determined that claimant was capable of performing at least medium duty work. The evaluation indicates that claimant is capable of performing more work than he testified. In reaching this decision, I note that Dr. Danks in his letter of May 3, 2006 indicated that claimant's work limitations would be dictated by the functional capacities evaluation. I also note that even though Dr. Danks did not state that claimant had not reached maximum medical improvement until his letter of May 3, 2006, Dr. Danks admitted in that same letter that he had not evaluated the claimant since March 14, 2006. Thus, there was no apparent change in the claimant's physical condition.

Accordingly, for the foregoing reasons, I find that claimant remained within his

healing period and that he continued to suffer a partial incapacity to earn wages from the time of the last hearing on January 5, 2006 and continuing until March 21, 2006, when claimant underwent his functional capacities evaluation. Dr. Danks subsequently indicated that claimant's work limitations would be dictated by that evaluation which did indicate that even with the unreliable effort claimant was capable of performing at least medium work.

In the event respondent has not paid temporary partial disability benefits from January 5, 2006 through March 21, 2006, respondent has controverted claimant's entitlement to those benefits and is responsible for the maximum attorney fee.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, surgery by Dr. Danks. Claimant is entitled to temporary partial disability benefits from January 5, 2006 through March 21, 2006. Respondent has controverted claimant's entitlement to any unpaid temporary partial disability benefits during this period of time.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary partial disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE

